Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the	)	MB Docket No. 05-311
Cable Communication Policy Act of 1984	)	
as amended by the Cable Television	)	
Consumer Protection and Competition	)	
Act of 1992	)	

REPLY COMMENTS OF THE NEW JERSEY
DIVISION OF THE RATEPAYER ADVOCATE

SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE
31 Clinton Street, 11th Floor
Newark, New Jersey 07171
973-648-2690 – Phone
(973) 648-4873 – Fax
www.rpa.state.nj.us

On the Comments:
Christopher J. White, Esq.
Deputy Ratepayer Advocate

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I. INTRODUCTION

On November 3, 2005 (released November 18, 2005), the Federal Communications Commission ("FCC") adopted a Notice of Proposed Rulemaking ("NOPR") (MB Docket No. 05-311), soliciting comments on how it should implement Section 621(a)(1) of the Communications Act of 1934, as amended ("Act"). The FCC received comments from 2,877 parties[1], including the State of New Jersey, Division of the Ratepayer Advocate ("Ratepayer Advocate"). Based upon our review of the comments filed by other parties, the Ratepayer Advocate respectfully submits these Reply Comments.

II. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING

As an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities, the Ratepayer Advocate is committed to fostering an environment that will benefit all cable customers through the development of a robust and competitive cable market. Such a market will provide consumers with the greatest number of choices at the lowest rates. However, the Ratepayer Advocate is also mindful of the important responsibilities granted to the local franchising authorities ("LFAs") through federal legislation. The LFAs role is to balance the goal of a vibrant and competitive cable market with the need for proper oversight over entities that are granted the right to offer services in their franchise areas. The Ratepayer Advocate believes that this balance is important. Moreover, this balance is already provided for in current federal and state

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[1]/ The entire record in this proceeding currently contains over 4,100 documents.

law, which grants the right to award cable franchises to the LFAs. In the State of New Jersey, the New Jersey Board of Public Utilities is the LFA.

III. DISCUSSION OF THE ISSUES

The vast majority of parties submitting comments in this proceeding recognize the importance of a competitive cable market. However, most of the parties submitting comments also recognize that the current local franchising process is working well. The notable exceptions are Verizon, AT&T, and to some extent, Qwest, the three telecommunications companies seeking to expand into the cable television market. At the onset, it should be noted that there are four options for entry into the multichannel video programming distributor ("MVPD") market, as discussed by the FCC in paragraph 2 of the NOPR. This proceeding concerns the provision of service via a cable system and any entrant proposing to enter the market as a cable system becomes subject to the requirements of Section 621 of Title VI of the Act.

Certain parties in this proceeding have argued that the local franchising requirements infringe upon their First Amendment rights. However, these concerns are unfounded, for several reasons. First, the LFAs are not restricting programming content, they are simply ensuring that the public rights-of-way are protected. Second, the video programmer is free to offer services using one of the other delivery technologies, which would not require approval by the LFAs. Third, in most cases, the new entrant will receive a franchise if the applicant agrees to the same terms and conditions under which service is currently being provided by the incumbent. These terms and conditions address the relationship of the provider with the municipality and with its customers.

They do not address content. Thus, there is no basis for any party to argue that the local franchising requirements being addressed herein violate any party's First Amendment rights.

Verizon goes on to argue that "there is no question that the current local franchising process generates unwarranted delays and is engrained with overreaching practices - most of which are unlawful under the Cable Act and the First Amendment - and all of which are encouraged by incumbent cable operators in an effort to hinder competitive entry into the video market."[2] As an incumbent telecommunications company whose efforts were long directed at hindering competitive entry of others in the telecommunications market, Verizon's comments are disingenuous and misplaced.

The record in this case is clear that, for the most part, there are no unwarranted delays in the cable franchising process. Moreover, to the extent that such delays exist, they are frequently caused by the franchise applicant, who wants to enter the cable market on more favorable terms than those provided to the incumbent cable operator. Proponents are not looking for a level playing field, they are looking for a seriously tilted playing field, one where they can selectively choose to whom to market cable services without any requirement to meet more broadly based community needs.

Indeed, as discussed by the Public Cable Television Authority ("PCTA"), it is the refusal of new entrants to abide by the same terms as other cable operators, and not onerous cable restrictions, which has hindered the new entrants' ability to obtain franchises in California. In its comments, the PCTA pointed out that at least one new entrant has "...refused to budge from its 'one size fits all' approach to the franchising

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[2]/ Comments of Verizon, page i.

process and local community needs."[3] New entrants have effectively rejected an agreement based on terms and conditions similar to those used for Time Warner, the incumbent, and instead have opted for a drawn out, personalized process. Moreover, the PCTA also pointed out in its comments that some new entrants' customer service standards are inferior to those currently required for the incumbent cable operators and that some new entrants are requesting the suspension of even these standards during the first six months during which they provide cable service to PCTA customers.

Most states, and in fact most LFAs, welcome competition in the cable market and recognize the benefits that such competition can bring to consumers. There is little argument that competition does result in more cable choices and lower rates. However, as pointed out by the Virginia Cable Telecommunications Association, LFAs should not "ignore their obligations under Section 621(a)(3) to assure that service is not denied to potential subscribers based upon income, or their rights under Section 621(a)(4)(A) to allow a cable system to become capable of providing cable service to all households in the franchise areas."[4]

The problem is not that the current franchising system is burdensome, or unnecessary, or biased, or illegal. The problem is that Verizon, and to some extent AT&T and Qwest, are effectively seeking the elimination of effective oversight by the LFAs.

Most of the other parties in this case recognize that the current cable franchising mechanism is both necessary and reasonable. The system is working well. Moreover, if a new entrant believes that an LFA has unreasonably rejected a request for a cable

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[3]/ Comments of the PCTA, page 2.

[4]/ Comments of the VCTA, page 4.

franchise, there are already mechanisms and remedies in place. Finally, the FCC simply does not have the legal authority to circumvent LFA franchising requirements and determinations. Any attempt by the FCC to impose limitations on the LFA with regard to timing or conditions of a franchise award is a violation of the authority granted to the LFA by federal law, and explicitly mandated by the limited powers of the federal government and the expansive power of states under our Constitutional form of government.

The Current Local Franchising Mechanism Is Working Well

As properly noted by the Southwest Suburban Cable Commission ("SWSCC"), "[t]he concept of local franchising is to manage and facilitate, in an orderly and timely fashion, the use of the public rights-of-way."[5] The SWSCC went on to note that they have a fiduciary responsibility for which they are held accountable. The same is true of all LFAs.

In comment after comment, the FCC heard that the local franchising mechanism is working well. Comments filed by the City of Santa Rosa, California are typical. The City states that the franchising process works well in Santa Rosa. Moreover, as noted by Santa Rosa, "[l]ocal cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements."[6] Moreover, Santa Rosa correctly points out that without the

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[5]/ SWSCC Comments, page 3.

[6]/ Comments of Santa Rosa, page 1-2.

local franchising authority, it would not have been able to enforce provisions of its franchise requirements such as INET and community access channels.

The local franchising process provides an important forum for local communities to make choices about those communities. Given the differences in geography, demographics, and community interest, a "one size fits all approach" to franchising is illogical and cannot hope to meet the needs of individual communities. The current framework allows the LFAs to ensure that the specific needs in their communities are being met and that the customer service standards that their communities expect will be upheld.

In some cases, states are taking steps to further streamline the franchising process, where necessary. In New Jersey, legislation was recently proposed to permit the award of statewide cable franchises by the LFA. In its comments, the Virginia Cable Telecommunications Association ("VCTA") notes that both Houses of the Virginia legislature have recently passed bills that, if enacted into law, will speed up the franchising process. However, it is important to note that these are local or state initiatives. These legislative efforts are directed at meeting specific needs in these states. In addition, these efforts confirm that the states are both receptive to, and responsive to, arguments that modifications to existing franchise requirements may be appropriate in some cases. But clearly the LFA is in the best position to know whether certain procedures and processes should be modified and if so, in what fashion.

While the Ratepayer Advocate generally supports these legislative efforts regarding statewide cable franchising, the adoption of statewide cable franchises should not result in any weakening of the current regulatory framework. The Ratepayer

Advocate recommends that companies receiving a statewide cable franchise should still be required to file for deregulation/effective competition on a local basis. Therefore, cable operators seeking a finding of effective competition should be required to demonstrate that effective competition exists in each municipality for which the cable operator is requesting such a finding.

The Current Local Franchising Mechanism Is Responsive To Local Community Needs

Local franchising provides important customer service protections. In filed comments, several LFAs noted examples of customer service problems they experienced and expressed the need to address customer service issues at the local level. For example, Leibowitz & Associates, P.A. ("L&A") correctly points out in its comments that "[r]esidents call City Hall and constituents expect local officials to have the power to solve the problem."[7] L&A noted that service in the City of Jacksonville "was so poor that the City was besieged with thousands of complaints. Only after the imposition of millions of dollars in fines did the cable operator respond."[8] Without the ability of the LFA to negotiate and enforce local franchise agreements, municipalities would have little recourse, and few options, to effectively resolve customer service issues. These issues can only be handled effectively at the local level. If the local municipality no longer has franchise authority, or has its franchise authority severely curtailed as some proponents recommend, the municipality's hands are effectively tied with regard to correction of serious customer service problems.

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[7]/ Comments of Leibowitz & Associates, P.A., page 7.

[8]/ Id.

The LFA is also in a better position than the FCC to know what the community's expectations are with regard to PEG access. Under the current franchise process, the LFA can negotiate for PEG access that meets the specific requirements and expectations of the service area, taking into consideration such factors as demographics, geography, income levels, and other parameters. As noted by L&A, LFAs can negotiate such issues as PEG access, channel capacity, capital support and other requirements only through their local franchising authority.

It should be noted that without this local franchising authority, many communities would simply not have access to the resources needed to provide equipment and other requirements for PEG access. Schools, libraries, and other public buildings may not have ready access to cable programming services without the authority granted to the LFAs to negotiation local franchise agreements with cable operators.

Local officials have the understanding of the local community that federal officials lack. Moreover, as noted by L&A, "Local Franchising Authorities have an interest and the right, delegated by Congress to prevent economic redlining, to establish and enforce customer service standards and to ensure the provision of adequate public, educational and governmental access channel capacity, facilities or financial support. Furthermore, for the minority of communities that may abuse their authority, the solution is not to undermine the entire franchising process. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest."[9] The Ratepayer Advocate agrees. The LFA process is already in place and working well.

[9]/ Comments of L&A, page 2.

The FCC Does Not Have the Legal Authority to Modify The Local Franchising Process

The Ratepayer Advocate reiterates its earlier comments that the FCC does not have the authority to override the local franchising process. The VCTA correctly points out in its comments that "the Commission lacks the authority under Section 621(a)(1) to override key aspects of local franchising to benefit new entrants."[10] Federal law puts few restrictions on the ability of LFAs to award franchises. The LFAs cannot unreasonably refuse to award an additional competitive franchise. In addition, the LFAs must allow a cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area. However, the determination of whether the refusal by an LFA, or the time period to build-out cable service throughout the franchise area, is "unreasonable," is not defined in federal law, leaving such discretion up to the LFAs. Moreover, there is already a remedy in place to address those situations where an applicant believes that the decision of the LFA is unreasonable.

While proponents bemoan the imposition of stringent and unreasonable requirements in their comments, they did not argue that LFAs are unreasonably refusing to award cable franchises. Nor did proponents demonstrate that the appeals process that is currently available to cable applicants is inadequate. They argue that the process is too slow but do not allege that LFAs are routinely denying the award of additional cable franchises in circumvention of federal law.

In fact, on page 2 of its comments, AT&T acknowledges that "the urgent need for national rules to give content to the § 621(a)(1) reasonableness requirement does not rest

[10]/ Comments of VCTA, page 2.

on evidence that many local franchising authorities ("LFAs") have in the past imposed anticompetitive barriers to entry and failed to allow competitive entry as quickly and effectively as possible or on predictions that LFAs will intentionally abuse the franchising process in the future. Rather it is the revolutionary change in technology, the scale and scope of planned entry and video marketplace dynamics that guarantee that continuing to leave the conditions on (and the timing of) competitive video entry entirely in the hands of local authorities would produce intolerable entry barriers...".

These comments, and those filed by other proponents, suggest that the telecommunication companies do not have specific concerns about the <u>mechanics</u> of the current process, but instead are opposed to <u>any</u> process that would restrict or limit their ability to provide competitive cable services. Proponents simply do not want to meet any requirements imposed by the LFA, no matter how germane to the provision of cable service. The companies want to be unfettered to pursue a strategy of selective participation in the cable television market so that they can reap the greatest benefits with the least amount of risk to shareholders.

Build-Out Requirements Provide A Level Playing Field And Should Be Maintained

Proponents do not argue that the LFAs have been providing an "unreasonable" amount of time for the company to build-out throughout the franchise area; instead, proponents argue that any build-out requirement is unreasonable.

As noted by L&A on page 14 of its comments, "[b]uild out requirements ensure that there is a simple, objective, easily administered test of economic feasibility as to where cable service has to be available. Having a clear test helps to ensure that the cable company's facilities are extended into all neighborhoods meeting this test." New entrants argue against build-out requirements, seeking to circumvent Section 621 of the Act that requires the LFA to assure "that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." While the LFA cannot impose an unreasonable build-out period, the LFA clearly has the authority, and the Ratepayer Advocate believes the responsibility, to ensure that cable service is offered to all customers within the franchise area. The current process does not require a cable operator to provide service throughout an entire state. Indeed, many cable franchise areas are relatively small and therefore the new entrants already have a large degree of discretion regarding where to provide service. But once the cable operator is awarded a franchise, they should have the obligation to provide service to all customers within that service area within a reasonable period of time.

As pointed out by the City of St. Louis, "public rights of way are valuable local resources given by the local residents and entrusted to their local officials. Breaking that trust with the local citizens under the disguise of promoting speedy entrants of competitive providers is misplaced."[11] The Ratepayer Advocate agrees. The City of St. Louis also makes important points about focusing this issue when it states that "Local franchises are not used to establish broad national policies, or change the regulatory climate. They are first and foremost property-related contracts, in which two parties voluntarily enter into a mutual long-term agreement for one entity to make its property

[11]/ Comments of St. Louis, pages 42-43.

available and the other entity to pay for its use. That compensation includes a mix of cash and public benefits/protections."[12]

Verizon, AT&T, and Qwest all oppose efforts by the LFAs to ensure that franchises are awarded on a fair and non-discriminatory basis, since each of these parties opposes build-out requirements that would be put the new entrants on a level playing field with the incumbent cable operators. However, requiring LFAs to provide preferential treatment to new entrants, as suggested by these three parties, is unfair and would result in an unequal distribution of the availability of cable service.

The Ratepayer Advocate shares the views of many parties that a robust and competitive cable market will provide consumers with the greatest number of choices and will result in lower rates. However, build-out requirements are already addressed in federal law, which requires that a new entrant be given a reasonable period of time to offer service throughout the franchise area. The LFA should not be a partner with a cable operator in selectively choosing those customers to whom a competitive cable offering will be made available. Instead, the LFA should comply with current federal law in granting the new entrant a "reasonable" period of time to extend service. At the end of that period, service should be available to all customers on a non-discriminatory basis.

Qwest argues that build-out requirements are unreasonable and recommends that an LFA be prohibited from requiring "a new wireline entrant, seeking to enter a market in competition with an established incumbent, to build-out its facilities to any neighborhood already covered by the incumbent."[13] Qwest's proposal does not advance the goal of competition, it would simply permit Qwest to enter into new markets with no

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12/ Comments of St. Louis, page 41.

13/ Comments of Qwest, pages 25- 26.

requirements to serve existing customers. Quest also argues that any franchise application that is not denied within six months of filing should be "deemed granted" as a matter of law. However, current law does not place a six-month restriction on the LFA and the FCC has no authority to unilaterally impose such a restriction.

The Ratepayer Advocate strongly concurs with the comments filed by the L&A that "[l]ocal cable franchising ensures the providers are permitted access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that the local community's specific needs are met and that local customers are protected. Without the franchising process, the LFAs would be unable to provide this important supervisory function."[14]

As noted by L&A, Congress specifically granted to LFAs the authority to award franchises. "Congress did not intend for the Commission to preempt or supersede local government's franchising authority. Congress respected the powers of local franchising authorities. The Cable Act acknowledges that municipalities are best able to determine a community's cable-related needs and interest."[15]

The Ratepayer Advocate respectfully argues that the FCC does not have the authority to change federal law. LFAs have the authority to award cable franchises within broad parameters. If a cable operator believes that it was unreasonably denied a cable franchise, it can appeal that decision in court pursuant to federal law. The proponents' attempt to severely curtail the ability of the LFAs to award local franchises should be

[14]/ Comments of L&A, page 2.

[15]/ Id.

seen for what it is -- an attempt to enter the cable television market on a selective basis with little or no accountability to the local community. Accordingly, such attempts to circumvent federal law and bypass local franchising requirements should be rejected.

The Commission Should Examine Other Important Issues With Regard to New Entrants

As noted in the Ratepayer's Advocate initial comments, the entrance of new participants in the cable television market, as well as the proliferation of new services by traditional cable operators, raises questions that need to be addressed within the framework of cable regulation, such as regulation of the Cable Programming Services ("CPS") tier by the states; the need for structural separation of video and non-video services; the appropriate allocation of costs between video and non-video services; the need to require the filing of Cost Allocation Manuals ("CAMs") by parties offering both video and non-video services; the need for cable operators to support upgrade costs through the filing for Form 1235; and other cost issues. These issues should be examined by both the FCC and the LFAs, as necessary, in order to ensure that cable customers are only paying their fair share of capital and operating costs, and are not subsidizing the non-video operations of either existing cable incumbents or of new entrants.

IV. CONCLUSION

The comments filed by the parties in this docket demonstrate that the current local franchising mechanism works well and is not being abused. Calls by new entrants such as Verizon, AT&T, and Qwest to limit the role of the LFA are self-serving and reflect the desire of the new entrants to selectively enter the cable market, on terms more favorable than those provided to the incumbent cable operator.

The build-out requirements adopted by the LFAs, and opposed by the new entrants, are permitted under federal law. Moreover, these requirements ensure that access to the public rights-of-way is provided on a non-discriminatory basis and that all customers will have equal access to cable services. Local franchising requirements also provide benefits to the local communities and ensure that the cable operators are sensitive to the local needs of the service area.

The FCC does not have jurisdiction to limit or restrict the local franchising jurisdiction of the LFAs. There are already remedies in place if a franchise appliant believes that a LFA has acted unlawfully in denying a franchise. Therefore, calls by the new entrants for the FCC to limit or restrict the jurisdiction of the LFAs should be rejected.

Finally, in examining various issues impacting on the provision of cable service, the FCC, and state and local jurisdictions, should examine other issues relating to the appropriate allocation of costs and the need for structural separation, to ensure that any entrant, whether a cable company or a telephone company, do not subsidize entry into each other markets.

Respectfully submitted,

SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE

By: *Christopher J. White*
Christopher J. White, Esq.
Deputy Ratepayer Advocate